NO. 84-1383

COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

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BRYN MAR, LTD, a Limited Partnership,
by its General Partner,
ANGEL MANAGEMENT CORPORATION,
a California Corporation;
ROBERT BIENER, ESTELLE BIENER,
BARTON J. BLINDER, ROBERTA BLINDER,
JAIME BOROVINSKY,
CHARNE DORA BOROVINSKY,
ARMANDO HERNANDEZ and MIRTA HERNANDEZ

v.

CARLTON BROWNE AND COMPANY, INC.,
a California Corporation and
RICHARD C. BROWNE

ON WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

R. RICHARD FARNELL, A
PROFESSIONAL CORPORATION
One Newport Place, Tenth Floor
Newport Beach, California 92660
(714) 851-2488
in association with
MARGARET KATHRYN MAAS, A
PROFESSIONAL LAW CORPORATION
5315 Avenida Encinas, Suite M
Carlsbad, California 92008
(619) 438-1203

Attorneys for Petitioners

QUESTIONS PRESENTED FOR REVIEW

A. Whether the United States District Court of Appeals for the Ninth Circuit incorrectly applied the law and overlooked material facts in holding that Petitioners [1] failed to submit evidence raising triable issues of fact on the question of indictable mail fraud.

B. Whether an alternative to summarily disposing of the Petitioners' appeal was available to the United States District Court of Appeals for the Ninth Circuit.

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1. The caption of this Petition for Writ of Certiorari contains the names of all parties to the proceedings had before the United States District Court for the Southern District of California and the United States District Court of Appeals for the Ninth Circuit.

C. Whether the United States District Court of Appeals incorrectly held that Respondents had met their burden as proponents of a Motion for Summary Judgment of Petitioners' Claims under the Racketeer and Corrupt Organizations Act ("RICO").

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OPINIONS BELOW

The September 24, 1984 Opinion of the United States Court of Appeals for the Ninth Circuit whose judgment is herein

sought to be reviewed is unreported and is reprinted in a separate Appendix A attached to this Petition. The prior opinion of the United States District Court for the Southern District of California of September 29, 1983 is unreported and is also reprinted in a separate Appendix B attached to this Petition.

JURISDICTION

A. Timeliness of Petition:

The Order of the United States District Court for the Southern District of California granting Respondents' Motion for Summary Judgment was entered on September 29, 1983, and is reprinted in a separate Appendix C to this Petition. The Notice of Appeal was timely filed by Petitioners within thirty (30) days thereafter as required by Rule 4(a)(1) of the Federal Rules of Appellate Procedure. The Judgment of

the United States Court of Appeals for the Ninth Circuit affirming the District Court's Judgment was entered on September 24, 1984, Appendix A. Petitioners' Petition for Rehearing with Suggestion for Rehearing In Banc was timely filed on October 9, 1984 as required by Rule 40(a) of the Federal Rules of Appellate Procedure. The Order of the United States Court of Appeals, Ninth Circuit, denying Petitioners' Petition for Rehearing and Suggestion for Rehearing In Banc, was entered on December 7, 1984, and is reprinted in a separate Appendix D.

B. Jurisdiction of this Court:

Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

A. Constitutional Provisions:

Article III, Section II(2) of the

United States Constitution reads in pertinent part as follows:

> "...In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

B. Statutory Provisions:

Sections 1341, 1961, 1962 and 1964 of 18 U.S.C. are reprinted in a separate Appendix E to this Petition.

STATEMENT OF THE CASE

Petitioners originally initiated an action in the United States District Court for the Southern District of California ("District Court") against Respondents, CARLTON BROWNE AND COMPANY, INC. and RICHARD C. BROWNE in June of 1982, as a Complaint for violations of the RICO Statutes, 18 U.S.C. Sections 1962 and 1964. (See Appendix E) Subject matter jurisdiction in the District Court was pursuant to the RICO

Statute. Extensive hearings as to the disputes between the parties were held from August of 1982 through August of 1983, before the Honorable William B. Enright.[2] In August of 1983, Respondents filed a Motion for Summary Judgment of Petitioners' RICO claims, which motion was argued by the parties on September 12, 1983.

On September 29, 1983, the District Court filed a Memorandum Decision and Order granting Respondents' Motion for Summary Judgment, on the grounds that Petitioners had failed to produce evidence refuting Respondents' claims that (1) no indictable mail fraud

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2. Further and more detailed specifics as to the prior proceedings and the history of the parties' disputes are set forth within Section IIA and B of Petitioners' Opening Brief on Appeal, filed with the Appellate Court on February 23, 1984.

pursuant to 18 U.S.C. Section 1341 was committed by Respondents, (2) no "RICO" injury distinct from the predicate acts could be proven, and (3) the infiltrated enterprise in question did not engage in interstate commerce.

Petitioners appealed the District Court's decision to the United States Court of Appeals for the Ninth Circuit ("Appellate Court") on October 31, 1983, and following oral argument of same on August 8, 1984, the Appellate Court affirmed the District Court's decision, in its entirety, on September 24, 1984. The Appellate Court did not address the District Court's ruling as to (2) and (3) above, but affirmed the summary judgment solely on the basis of Petitioners' failure to raise triable issues of fact with regards to the existence of indictable mail fraud. In this context, the Appellate Court ruled

that Petitioners had failed to submit competent evidence opposing Respondents' motion. The Appellate Court held, for the first time, that the Affidavits submitted by Petitioners in the District Court below were "incompetent". The Appellate Court further indicated in its decision that although Petitioners had made extensive and detailed allegations in their brief opposing Respondents' motion, with an appendix thereto containing supporting citations to apparently competent deposition testimony, in that Petitioners failed to lodge any of the deposition transcripts with the District Court, no competent evidence refuting Respondents' motion was produced by Petitioners.

REASONS FOR GRANTING WRIT OF CERTIORARI

The Appellate Court affirmed the District Court's decision on the grounds that Petitioners had failed to submit

competent evidence opposing Respondents' motion for summary judgment. In reaching this decision, Petitioners respectfully submit that the Appellate Court overlooked competent evidence submitted by Petitioners which refuted the argument made by Respondents. No question as to the competency of Petitioners' evidence was ever raised in the District Court, and the Appellate Court raised, and determined, such issue sua sponte for the first time on appeal. The Appellate Court's decision was thus in direct conflict with prior decisions of that same Court relating to summary judgment proceedings and clear precedent prohibiting the raising of issues for the first time on appeal.

With its decision, the Appellate Court misunderstood the nature of the record before it, which misunderstanding effectively and summarily precluded a

decision being made on the merits of Petitioners' appeal. The Appellate Court's decision constitutes a manifest abuse of discretion in that such decision was not based on the merits of Petitioners' appeal, although the District Court had granted summary judgment to Respondents based on the merits.

Moreover, a review of the evidence submitted by Respondents in support of their Motion for Summary Judgment demonstrates that no evidence was presented on the issue of indictable mail fraud, and there was thereby no shifting of any burden on Petitioners' part to produce contra evidence.

The Appellate Court's decision conflicts with prior opinions issued by the same Court as to summary judgment proceedings and the raising of issues for the first time on appeal. In order

to insure a uniformity of judicial decisions, and to prevent the adverse effect of conflicting decisions as to future matters presented, Petitioners suggest that the granting of this Petition for Certiorari would be appropriate. This matter is of exceptional importance due to said conflicts and adverse effects. In addition, in that the effect of the Appellate Court's decision prevented a decision being rendered as to the merits of Petitioners' appeal, which decision was based upon issues raised by that Court sua sponte for the first time, a manifest injustice occurred.

Petitioners respectfully submit that this Court would be acting well within its discretionary authority in granting Petitioners' Petition for Writ of Certiorari herein based upon the provisions of the Supreme Court Rules,

Section 17.1(a) which reads in pertinent part as follows:

> "A review of Writ of Certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore.... (a) When a Federal Court of Appeals ... has so far departed from the accepted and usual course of judicial proceedings were so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

ARGUMENT

A. IT IS IMPROPER FOR THE APPELLATE COURT TO RAISE, AND DETERMINE, ISSUES FOR THE FIRST TIME ON APPEAL.

It has long been established that it is not the function of the appellate court to consider matters raised for the first time on appeal, and not at issue in the court below. United States v. Greger, 716 F.2d 1275, 1277 (9th Cir. 1983), cited with approval in the civil RICO case of White v. White, 731 F.2d 1330, 1440-1442 at fn. 1 (9th Cir. 1984); see also, United States v.

Larson, 507 F.2d 385, 387 (9th Cir. 1974). Only in those situations where an initial review at the appellate level is "necessary to prevent a miscarriage of justice or to preserve the integrity and reputation of the judicial process", will an exception to this well settled rule be created. United States v. Greger, supra; United States v. Segna, 555 F.2d 226, 231 (9th Cir. 1977); United States v. Larson, supra; Marshall v. United States, 409 F.2d 925, 927 (9th Cir. 1969).

No such exceptional occurrence of manifest injustice was before the Appellate Court warranting the consideration, and determination, of an issue not previously considered by the lower court. In fact, it is strongly suggested by Petitioners that the Appellate Court's action in raising, and then deciding, an issue which had not

been previously raised, and thereafter essentially summarily dismissing Petitioners' appeal on the basis of such issue, constitutes an manifest injustice. This injustice directly contradicts, rather than supports, "the integrity and reputation of the judicial process." United States v. Gregor, supra.

The Appellate Court determined sua sponte that the affidavits submitted by Petitioners in opposition to Respondents' Motion for Summary Judgment were incompetent. No objection of this nature, either generally or specifically, was ever at issue in the Court below. The District Court in its Opinion granting summary judgment considered such affidavits, as well as the other evidence submitted by Petitioners, as competent and made reference to same. (See Appendix B at

been previously raised, and thereafter essentially summarily dismissing Petitioners' appeal on the basis of such issue, constitutes an manifest injustice. This injustice directly contradicts, rather than supports, "the integrity and reputation of the judicial process." United States v. Gregor, supra.

The Appellate Court determined sua sponte that the affidavits submitted by Petitioners in opposition to Respondents' Motion for Summary Judgment were incompetent. No objection of this nature, either generally or specifically, was ever at issue in the Court below. The District Court in its Opinion granting summary judgment considered such affidavits, as well as the other evidence submitted by Petitioners, as competent and made reference to same. (See Appendix B at

pp. 6, 19 and 23-24.)

Petitioners respectfully submit that it was the responsibility of the Appellate Court, as the reviewing Court, to consider all matters considered by the District Court, notwithstanding any independent views the Appellate Court had as to "competency". It was further the responsibility of the Appellate Court, given the nature of Petitioners' appeal, to view the matters presented, and only those matters, in the light most favorable to Petitioners, the opponent to the summary judgment proceedings. Keating v. BBDO International, Inc., 438 F. Supp. 676 (D.C.N.Y. 1977). This responsibility was not met when the Appellate Court independently and of its own volition raised, and determined, a crucial issue not before it. The Appellate Court's determination of same effectively and

summarily precluded a decision on the merits of Petitioners' appeal.

The District Court rendered its decision granting summary judgment to Respondents on the merits, giving due consideration to all evidence submitted. Petitioners submit respectfully that it was the Appellate Court's responsibility to do likewise. Petitioners should not have been prevented from having a decision made on the merits of their appeal.

The Appellate Court also determined of its own volition that Petitioners submitted no testimonial or documentary evidence in that Petitioners did not lodge deposition transcripts with the District Court. This issue was never before the District Court, nor did the District Court ever consider, or rule upon, this issue.

By the time of the hearing of

Respondents' Motion for Summary Judgment, numerous and extensive hearings had been held before the Honorable William B. Enright with regards to the disputes existing between the parties. Judge Enright was well versed in the nature of these disputes and the substance of the allegations being made by the parties. The record before the Court was voluminous. As a result, and as a convenience to the lower court, Petitioners excerpted substantive testimony of parties and witnesses within an appendix to Petitioners' responsive pleadings to Respondents' motion. The number of deposition transcripts containing the excerpted testimony was massive, and the lodging of all such transcripts would have been seriously burdensome to the District Court, given the already voluminous nature of its record.

At the time Petitioners determined to so submit evidence to the Court, they offered to make immediately available to the Court any and all transcripts and documents which the Court desired. (See Petitioners' Appellate Excerpt: Opposition, CR:98, at p.i (Preamble) Petitioners did not merely vaguely and abstractly cite the subject evidence. Each citation to deposition testimony contained an appropriate reference to the deponent and pertinent deposition page number(s), while each document referenced was clearly identified. The accuracy of Petitioners' excerpting was never questioned.

No request was ever made by the District Court to review any of the referenced testimonial and documentary evidence, nor was any objection specifically raised or posed by Respondents as to Petitioners' excerpt

procedure. At no time prior to, during or subsequent to the hearing of Respondents' motion did Respondents move to strike from consideration the evidence submitted by Petitioners. Moreover, at the time of the oral argument of Respondents' motion, Petitioners again invited the District Court's attention to this evidence, and offered for a second time to provide any and all testimonial and documentary evidence desired by the Court. (See Reporter's Transcript of proceedings of September 12, 1983, at p. 22.) While the Court below inquired as to certain matters raised by Petitioners' argument, no request was made that Petitioners provide the Court with deposition transcripts.

Having failed to raise any specific objections to Petitioners' excerpt procedure, and by not moving to strike

the evidence contained therein, Respondents had no right to, and in fact did not, object to this evidence on appeal. It is well established that an objection to evidence cannot be posed for the first time on appeal. United States v. Wilson, 690 F.2d 1267 (9th Cir. 1982); Marshall v. United States, supra. It is further well settled that evidentiary objections, when made, must be specific, in order for such evidentiary matters to be a proper topic of appellate review. United States v. Wilson, supra. No such specific objections were presented by Respondents, or by the District Court.

The "evidence" submitted by Respondents in support of its motion was no more "competent" than that submitted by Petitioners. Like Petitioners, Respondents chose not to lodge deposition transcripts with the District

Court. Instead, Respondents attached selected and incomplete pages of deposition testimony to their motion, some of which were entirely out of context and misleading.

By its decision, the Appellate Court held that Respondents met their heavy burden in demonstrating the non-existence of triable issues of material fact such that the drastic remedy of summary judgment was justified. The Appellate Court further held that evidence submitted by Petitioners, which was not previously objected to and which was accepted, reviewed and considered by the District Court as competent, was "incompetent". Such a ruling constituted a manifest miscarriage of justice.

Rather than summarily disposing of Petitioners' appeal on the grounds of insufficient evidence, such that no

decision on the merits was made, an alternative was available to the Appellate Court. Such an alternative was employed by the same Court in the case of Stone v. Cardwell, 575 F.2d 724 (9th Cir. 1978). In Stone, an Arizona prisoner appealed the summary denial of habeas corpus relief. This appeal was based upon the prisoner's contentions that the sentence imposed upon him was not in accordance with the plea bargain, and that his plea of guilty was not knowingly and intelligently entered. In its consideration of this appeal, the Ninth Circuit Court of Appeals was concerned as to the meager record before it, particularly since this record did not appear to support the lower court's findings. The Appellate Court was further concerned about the fact that the sentence imposed upon the prisoner was far in excess of that which would

have been imposed had the prisoner been convicted on all counts, and received maximum penalties, thereby creating doubts as to the legitimacy of the subject plea bargain.

After review of the record before it, the Appellate Court noted the meagerness of this record and the fact that this record did not prove, or disprove, the ruling of the court below. To resolve these concerns, the Court held as follows:

> "We feel that appellant should have the opportunity to supplement the present record with transcripts of state proceedings in order to enable the district court to deal with those issues. If, in the judgment of the district court, the answers to these threshold issues are in the negative, then an evidentiary hearing must be granted appellant so that findings can be made by the district court upon the questions posed...." Id., 575 F.2d at 727.

With such ruling, the Appellate Court remanded the matter back to the District Court for further proceedings. Such a

remand procedure could easily have been adopted by the Appellate Court in this instance. Such a procedure would, most certainly, have been in line with the Court's policy of preventing miscarriages of justice, in preserving the integrity and reputation of the judicial process, and in determining cases on their merits.

B. RESPONDENTS DID NOT MEET THEIR BURDEN OF DEMONSTRATING THE ABSENCE OF TRIABLE ISSUES OF MATERIAL FACT AS TO THE EXISTENCE OF MAIL FRAUD.

Within its Memorandum, the Appellate Court discussed at some length the burdens imposed upon the moving and opposing parties to any summary judgment proceeding. (See Appendix A at pp. 4-5) The Appellate Court herein made reference to the heavy burden facing the proponent of a motion for summary judgment in demonstrating the absence of any genuine issue of material fact.

British Airways Bd. v. Boeing Co., 585 F.2d 946, 951 (9th Cir. 1978), cert. denied, 440 U.S. 981 (1979). After, and only after, this burden has been met by the moving party, is it the responsibility of the opposing party to come forward with evidence demonstrating the existence of factual issues. Fed. R. Civ. P. 56(e).

The factual issue which was the subject of the District Court's ruling, and which was under consideration by the Appellate Court was whether there was a triable issue of material fact as to the existence of mail fraud. As the Appellate Court noted in its Memorandum, the essential elements of mail fraud are: (1) the formation of a scheme to defraud, and (2) the use of the mails in the furtherance of the scheme. (See Appendix A at p. 7) 18 U.S.C. Section 1341; United States v. Bohonus, 628 F.2d

1167, 1171 (9th Cir. 1980), cert. denied, 447 U.S. 928. Petitioners respectfully submit that neither of these elements were disproved by Respondents, and as a result, any burden which would otherwise have been imposed upon Petitioners to produce refuting evidence never arose.

The purpose of a summary judgment procedure is not to determine factual issues, particularly when such issues involve questions of intent. Banco Nacional de Cuba v. Chemical Bank of New York Trust Co., 658 F.2d 903 (2nd Cir. 1981); Prochaska v. Marcoux, 632 F.2d 848 (10th Cir. 1980), cert. denied, 451 U.S. 984. As a result, summary disposition of a case based upon a failure of the plaintiffs to prove fraudulent intent would be improper. Even were specific intent a proper determination to be made as a part of

summary judgment, a careful review of the "evidence" submitted by Respondents reveals that none was submitted other than the self serving affidavit of Respondent, RICHARD C. BROWNE, which did not even bother to deny Petitioners' allegations.

The only issue which could be properly disposed of by means of a summary judgment proceeding dealt with the question of mailings. In that the motion pending before the District Court was for summary disposition, as opposed to trial on the merits, it was the burden of Respondents to disprove the fact of mailings. Upon review of the "evidence" submitted by Respondents, it is clear that not only did Respondents fail to disprove mailings, no conclusive evidence in either direction was submitted by Respondents.

The inability of Petitioners to

prove, with direct evidence, the fact of mailings becomes understandable when the testimony of the agents and employees of Respondents is considered. These individuals could not, or would not, testify as to mailings. Nor would these individuals testify as to the normal mailing procedure of Respondents. These same individuals testified that while a "hand delivered" notation on correspondence indicated personal delivery, the absence of such a notation did not necessarily indicate a mailing. (See, Petitioners' Appellate Excerpt: Appendix, CR:84, Dep. Tr. of D. Robinson at pp. 124, 132-133 and 186.) While the circumstancial evidence demonstrated mailings [which is sufficient pursuant to Beck v. United States, 305 F.2d 595 (10th Cir. 1962), cert. denied, 371 U.S. 890], no conclusive proof in either direction was submitted by Respondents.

Since Respondents did not prove the non-existence of mail fraud by demonstrating the absence of mailings, it was never the burden of Petitioners to show otherwise. Petitioners did, however, demonstrate to the District Court at least two (2) mailings, a sufficient showing for a RICO violation under 18 U.S.C. Section 1961(5). United States v. Weatherspoon, 581 F.2d 595 (7th Cir. 1978). By their Supplement Affidavit filed with the District Court, Petitioners demonstrated that certain pertinent loan documents pertaining to the fraudulent loan acquired by Respondents were mailed between Respondents and American City Bank. Petitioners' Appellate Excerpt: Supplemental Affidavit, CR: 109. The District Court specifically referenced statements made within such Affidavit

within its Opinion, and accepted, reviewed and considered this Affidavit as competent evidence. (See Appendix B at p. 19) The Appellate Court, however, summarily disposed of this Affidavit, as "incompetent". (See Appendix A at p. 4)

Based upon the above, Petitioners respectfully submit that the burden applicable to summary judgment proceedings never shifted to them, and that further Petitioners met any burdens imposed on the issue of mail fraud, properly decided by means of a summary judgment proceeding.

CONCLUSION

For the foregoing reasons, Petitioners respectfully submit that due to the importance of maintaining judicial decisional uniformity and of preventing miscarriages of justice, this Petition for Writ of Certiorari should be granted. Petitioners will receive a

decision on the merits of their appeal only if this Petition is granted.

DATED: February 21, 1985

Respectfully Submitted,

R. RICHARD FARNELL, A PROFESSIONAL CORPORATION
One Newport Place,
Tenth Floor
Newport Beach, CA. 92660
(714) 851-2488
in association with
MARGARET KATHRYN MAAS, A PROFESSIONAL LAW CORPORATION
5315 Avenida Encinas,
Suite M
Carlsbad, CA. 92008

Attorneys for Petitioners

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RICHARD C. BROWNE

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 83-6358

D.C. No. 82-0696-E(M)

MEMORANDUM*

BRYN MAR, LTD., et al.,
Plaintiffs-Appellants,
vs.
CARLTON BROWNE & CO., et al.,
Defendants-Appellees.

An Appeal from the United States
District Court
Southern District of California
Hon. William B. Enright,
Judge Presiding
Argued and Submitted August 8, 1984

* The panel has concluded that this appeal presents issues that do not meet this court's standards for disposition by written opinion. See 9th Cir. R. 21. Therefore, we order disposition by memorandum rather than by publication in the Federal Reporter. This memorandum may not be cited to or by the courts of this circuit.

BEFORE: Pregerson and Norris, Circuit Judges and Solomon, District Judge**

Bryn Mar, Ltd., and the individual appellants (collectively Bryn Mar) appeal the district court's order granting Carlton Browne and Co., Inc.'s and Richard Browne's (collectively Carlton Browne) motion for summary judgment and dismissing Bryn Mar's pendent state claims. The district court granted summary judgment against Bryn Mar on its claims for treble damages under the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. Sections 1961-1968 (1982). Bryn Mar's RICO claims arose from alleged foul

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** The Honorable Gus J. Solomon, Senior United States District Judge, District of Oregon, sitting by designation.

play by Carlton Browne in Bryn Mar's land investment and development venture. In particular, Bryn Mar claims that Carlton Browne pursued a fraudulent scheme to gain control of Bryn Mar's real estate venture, to illicitly conduct the affairs of the venture, and to wrongfully enrich itself.

I. Grant of Summary Judgment

A grant of summary judgment is reviewed de novo. Lojek v. Thomas, 716 F.2d 675, 677 (9th Cir. 1983). An appellate court's review is governed by the same standard used by the trial court under Fed. R. Civ. P. 56(c). Twentieth Century-Fox Film Corp. v. MCA, Inc., 715 F.2d 1327, 1328 (9th Cir. 1983). Thus, the reviewing court must determine whether there is any genuine issue of material fact such

that a trial is necessary and, if not, whether the substantive law was correctly applied. Amaro v. Continental Can Co., 724 F.2d 747, 749 (9th Cir. 1984). The party moving for summary judgment bears the burden of demonstrating the absence of a genuine issue as to any material fact. British Airways Bd. v. Boeing Co., 585 F.2d 946, 951 (9th Cir. 1978), cert. denied, 440 U.S. 981 (1979). If the moving party meets this burden, the burden then shifts to the party opposing the motion to come forward with evidence showing that there exists a genuine issue of fact. Fed. R. Civ. P. 56(e). If the opposing party fails to carry this burden by coming forward with controverting evidence, summary judgment must be entered against him. Id. The opposing party may not rest

upon the mere allegations or denials in its pleadings. Id.

Although appellant Bryn Mar pleaded a claim upon which relief could be granted under section 1964(c) of RICO, we must affirm the district court's grant of summary judgment. The district court's ruling was based upon Bryn Mar's failure to come forward with evidence with respect to some of the elements of a civil RICO claim. More specifically, the district court held that Bryn Mar failed to offer any evidence controverting Carlton Browne's showing that: (1) no indictable mail fraud was committed; (2) no injury distinct from the predicate acts was sustained; and (3) no allegedly infiltrated enterprise was engaged in interstate commerce.

Without addressing the propriety of

the district court's ruling in "2" and "3" above, we affirm the summary judgment solely on the basis of Bryn Mar's failure to raise a triable issue of fact with respect to the existence of indictable mail fraud. Both the civil and criminal provisions of RICO require that a "pattern of racketeering activity" be shown. 18 U.S.C. Section 1962. A "pattern of racketeering activity" means at least two acts of "racketeering activity" within a 10 year period. 18 U.S.C. Section 1961(5). "Racketeering activity" includes indictable mail, wire, and securities fraud. 18 U.S.C. Section 1961(1)(B). The "racketeering activity" alleged by Bryn Mar is Carlton Browne's purported acts of indictable mail fraud.

For an offense to be indictable,

there must be probable cause that a crime has been committed. Silverthorne v. United States, 400 F.2d 627, 634 (9th Cir. 1968), cert. denied, 400 U.S. 1022 (1971). The essential elements of mail fraud are: (1) the formation of a scheme to defraud and (2) the use of the mails in furtherance of the scheme. 18 U.S.C. Section 1341 (1982); United States v. Bohonus, 628 F.2d 1167, 1171 (9th Cir.), cert. denied, 447 U.S. 928 (1980); Devitt & Blackmar, Federal Jury Practice and Instructions, Mail Fraud Section 47.05 at 309 (1977). To establish a fraudulent scheme, the plaintiff must prove that the defendant acted with the specific intent to defraud. Id.

In support of its motion for summary judgment, Carlton Browne produced deposition testimony, affidavits, and

correspondence refuting some of the elements of mail fraud. Bryn Mar, on the other hand, produced no competent evidence raising a triable issue of fact on the issue of indictable mail fraud. Although Bryn Mar made extensive and detailed allegations in its motion for summary judgment and in its brief, the only materials in the record supporting its position are an incompetent affidavit and an appendix to its motion for summary judgment containing supporting citations to apparently competent deposition testimony. Unfortunately, Bryn Mar failed to file any of the transcripts which allegedly contained this probative testimony. Thus, Bryn Mar submitted no competent evidence raising a triable issue of fact with respect to the existence of indictable mail fraud.

Since unsupported allegations are insufficient to either oppose or support a motion for summary judgment, Fed. R. Civ. P. 56(e), we have no choice but to affirm the judgment of the district court. Id.

II. Dismissal of Pendent State Claims

In light of our affirmance of the summary judgment on the federal RICO claim, the district court did not abuse its discretion in its dismissal of the pendent state claims.[1] When federal claims are dismissed before trial or on a motion for summary judgment, the state pendent claims should be dismissed as well so that federal jurisdiction is not abused. United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966); Wre[illegible].Sletten Construction Co., 654 F.2d 529, 536 (9th Cir. 1981)

(per curiam).

AFFIRMED.

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1. These claims are embodied in a complaint filed in state court. The matter is set for trial on September 17, 1984.

APPENDIX B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 82-0696-E

MEMORANDUM DECISION

BRYN MAR, LTD., a Limited Partnership, by its General Partner, ANGEL MANAGEMENT CORPORATION, a California corporation; ROBERT BIENER, ESTELLE BIENER, BARTON J. BLINDER, ROBERTA BLINDER, JAIME BOROVINSKY, CHARNE DORA BOROVINSKY, ARMANDO HERNANDEZ and MIRTA HERNANDEZ,

Plaintiffs,

vs.

CARLTON BROWNE AND COMPANY, INC., a California corporation and RICHARD C. BROWNE,

Defendants.

AND RELATED CROSS-ACTION.

FACTS/BACKGROUND

Plaintiffs bring this civil action

under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. Sections 1961 et seq (herein RICO). The predicate substantive offenses involved are alleged violations of the federal mail fraud statute, 18 U.S.C. Section 1341.

This dispute centers around 333 acres of undeveloped real property located adjacent to the Palomar Airport. The plaintiffs, associated as Bryn Mar, Ltd., joined with defendant Carlton Browne & Co (herein CBC) to form the limited partnreship, Palomar Airport Properties (herein PAP). The purpose of the partnership was to develop the plaintiffs' real property. Under the partnership agreement, plaintiffs contributed their property and CBC promised to make a capital contribution of $450,000 and expend

$200,000 for pre-development of the property.

Plaintiffs contend that CBC, through its 100% shareholder Richard Browne, has engaged in a fraudulent scheme designed to gain control of their real property. Plaintiffs' specific allegations of fraud are summarized in this court's prior decision which denied the defendants' motion to dismiss. Memorandum Decision and Order, dated October 20, 1982 at p. 2.

Defendants move for summary judgment. They submit several affidavits aimed at refuting the fraud allegations. The main thrust of defendants' motion is tht the instant case is essentially a business dispute unrelated to the objectives of RICO.

STATUTORY PROVISIONS

Section 1964(c) establishes a civil

RICO action for violations of Section 1962, and permits plaintiffs to sue for treble damages, plus reasonable attorneys' fees and costs.

Section 1962(a) prohibits the use of income derived from a pattern of racketeering activity to acquire an interest in a business. Section 1962(b) prohibits acquiring an interest in a business through a pattern of racketeering activity. Section 1962(c) prohibits employees of an enterprise from conducting its affairs through a pattern of racketeering activity.

"Enterprise" is defined as "any individual, partnership, corporation, association or other legal entity and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. Section 1961(4). "Pattern of racketeering" is defined by

Sections 1961(5) and 1962(1) as the commission of two or more predicate offenses (including mail fraud under 18 U.S.C. Section 1341) occurring within a ten year period.

Plaintiffs allege violations of each provision of Section 1962. The first cause of action alleges that defendant Browne conducted the affairs of CBC through a pattern of racketeering in violation of Section 1962(c). The second claim alleges that Browne and CBC violated Section 1962(a) by receiving money from a pattern of racketeering and invested these funds in the establishment of PAP. The third cause of action alleges that Browne and CBC acquired an interest in PAP through a pattern of racketeering in violation of Section 1962(b).

HOLDING

Upon due consideration of the parties' memoranda and exhibits, the arguments advanced at the hearing, and for the reasons set forth herein, the court hereby grants the defendants' motion for summary judgment.

DISCUSSION

I. STANDARD OF REVIEW

Under Rule 56, Fed. R. Civ. P., summary disposition of all or part of an action is appropriate where there is no issue of triable fact, with all evidence and inferences construed in a light most favorable to the opposing party. British Airways Fiberglass Corp. v. Boeing Co., 585 F.2d 946, 950 (9th Cir. 1978), cert. denied, 440 U.S. 981 (1978).

II. PLAINTIFF'S RICO CLAIMS

The defendants make a number of

arguments in support of their motion. Several of these contentions are not persuasive and for purposes of clarity the court will discuss them first.

1. Nexus to Organized Crime

Defendants argue that Bryn Mar must show that CBC or Richard Browne is somehow related to organized crime. This court expressly rejected that argument in its earlier decision. Memorandum Decision, supra at 3-4. There is no nexus requirement set forth within the statute itself, and the Ninth Circuit has held that a criminal RICO action may proceed without a showing that the defendant has commections with organized crime. United States v. Campanale, 518 F.2d 352, 363 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1975). Plaintiff is not required to plead and prove a nexus to

organized crime. Bennett v. Berg, 685 F.2d 1053, 1063 (8th Cir. 1982).

2. Single Scheme to Defraud Not a "Pattern of Racketeering"

Defendants contend plaintiffs have alleged a single scheme to defraud which does not constitute a "pattern of racketeering" as required by Section 1962. The single fraud is CBC's acquisition of an interest in the Palomar property without contributing its own capital to the partnership. Defendants rely primarily on the decision in Teleprompter v. City of Erie, 537 F.2d 6 (W.D. Penn. 1981).

Teleprompter involved a civil RICO action based on allegations that employees of defendant municipality attended a single fund raiding (sic) dinner and tried to bribe a city official. Because those allegations

constituted only "one single act of bribery," the RICO claim was dismissed for failure to establish a pattern of racketeering. Id. at 13. The instant case is clearly distinguishable. Bryn Mar sets forth a number of separate mailings which are alleged violations of the mail fraud statute. Each separate mailing is a potential "act" of racketeering activity which, taken together, form a "pattern" sufficient to state a RICO claim, even if the acts were in furtherance of one scheme to defraud. United States v. Weatherspoon, 581 F.2d 595, 601-602 (7th Cir. 1978).

3. Defendants' Infiltration of an "Enterprise"

Defendants attack plaintiffs' first cause of action on the ground that RICO requires the culpable individual be

separate and distinct from the infiltrated enterprise. Bryn Mar's first count alleges that Browne conducted the affairs of CBC through a pattern of racketeering. Defendants object to plaintiffs' charactrization of CBC as a wrongdoer in the second cause of action and the "enterprise" in the first.

The plaintiffs' complaint is not defective on this ground. One entity may be both the wrongdoing person in one count and the enterprise in another, so long as the necessary RICO elements are alleged for each cause of action. Bennett v. Berg, supra at 1061 [dismissed RICO claim for failure to plead both elements, but granted leave to amend]. At least one court dealing with a criminal RICO action permitted a corporate entity to be both the

"person" and the "enterprise" within the same count. United States v. Hartley, 678 F.2d 961, 988 (11th Cir. 1982), cert. denied, 103 S. Ct. 815 (1983).

Plaintiffs' first count contains the necessary RICO allegations.

4. Pre-existence of the PAP Enterprise

Defendants contend that because PAP was not technically in existence prior to the defendants' wrongful conduct there can be no infiltration of an enterprise, as required under the statute. One commentator suggests that RICO contemplates an enterprise which is a "pre-existing" entity. Comment, Reading the Enterprise Element Back Into RICO, 76 Northwestern L. Rev. 100, 123 (1981).

The defendants' position on this

issue is not well taken. First, several of the defendants' alleged activities took place after the September 21, 1979 close of escrow on the PAP partnership. Secondly, even if some alleged fraud took place prior to September 21, 1979, the defendants clearly treated PAP as if it were a viable entity. Section 1961(4) provides a broad definition of "enterprise," including "any union or group of individuals associated in fact although not a legal entity." United States v. Rone, 598 F.2d 564, 568 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1979).

Plaintiffs' designation of PAP as the "enterprise" in Counts Two and Three should not be undermined by an unduly restrictive interpretation of the statute. United States v. Weisman,

624 F.2d 1118, 1125 (8th Cir. 1980), cert. denied, 449 U.S. 871 (1980).

5. $700,000 Loan is RICO Income

Plaintiffs' second cause of action alleges that CBC invested income in PAP which was derived from their racketeering activity. The "income" referred to in the second count is a $700,000 loan from American City Bank secured by the Palomar property apparently without the consent of limited partners. Defendants argue that this loan does not constitute "income" as contemplated by the statute.

Defendants cite no authority to support a finding that a bank loan does not constitute RICO "income," and this court can discern no reason why this transaction should not fall within the

statutory definition. The question remains, however, whether the plaintiffs have shown that the $700,000 was fraudulently acquired in violation of the federal mail fraud statute. The court's reservations on this issue are discussed infra.

.....

Through affidavit, exhibits and argument, defendants undermine the factual basis of plaintiffs' federal RICO action on several grounds. The court now turns to those arguments.

6. Plaintiffs Fail to Demonstrate Existence of a Predicate Offense

Defendants contend Bryn Mar has failed to establish that CBC committed indictable mail fraud. Mindful of the standard for granting summary judgment and after reviewing the evidence in a light most favorable to the plaintiffs,

this court agrees.

The predicate offenses alleged in the complaint are violations of the federal mail fraud statute, 18 U.S.C. Section 1341. To establish the "pattern of racketeering" required under RICO, plaintiffs must show that CBC committed at least two acts of indictable mail fraud. 18 U.S.C. Section 1961(1)(B). To be indictable, there must be probable cause or a reasonable probability that a crime has been committed. Bache Halsey Stuart Shields v. Tracy Collins Bank, 558 F. Supp. 1042, 1045 (C.D. Utah 1983); Silverthorne v. United States, 400 F.2d 627, 634 (9th Cir. 1968), cert. denied, 400 U.S. 1022 (1970). The essential elements of mail fraud are: 1) formation of a scheme or artifice to defraud, and 2) use of the mails in

furtherance of the scheme. United States v. Bohonus, 628 F.2d 1167, 1171 (9th Cir. 1980), cert. denied, 447 U.S. 928 (1979). There must be a specific intent to defraud. Id. at 1172.

Applying these principles to evidence presented, this court finds the plaintiffs have not established probable cause of a violation of Section 1341.

The mailings which constitute Bryn Mar's mail fraud claims fall into several categories:

A) CBC's Negotiations with Signal

Plaintiffs contend the defendants granted Signal Landmark a "secret option" on the real property at a price below the market value. Plaintiffs also contend they were never notified of the PBP joint venture between PAP,

Signal and Donald McHone.

The correspondence relating to these allegations consists primarily of letters from CBC to Signal and McHone which detail the terms of their agreement. There is correspondence between Richard Browne and one of the limited partners, Dr. Richard Beiner, (sic) concerning Bryn Mar's objection to the $12,500 per acre valuation of the property. These writings indicate the plaintiffs were notified of the Signal agreement at least prior to the close of escrow on the PBP transaction.

Assuming for the purposes of argument that this correspondence was sent through the U.S. mails, the plaintiffs fall far short of establishing indictable mail fraud. The letters evidence only a business dispute concerning the extent of CBC's

authority to contract with outside parties to develop the Palomar property. While this court expressly refrains from interpreting the propriety of CBC's actions under the PAP agreement, that contract apparently permits the general partner to contribute the real property to a joint venture at a price not less than $12,500 per acre. PAP Agreement Paragraph 13(a)(vi)(1).

B) $700,000 Loan

As indicated supra, plaintiffs allege CBC acquired a loan from American City Bank which was improperly secured by the Palomar real property. Plaintiffs contend this transaction was a breach of the PAP agreement and the letters sent regarding the loan constitute mail fraud.

While this transaction may or may

not give rise to certain state law claims, it does not constitute mail fraud. A violation of 18 U.S.C. Section 1341 requires specific intent to defraud. The letters relied upon by plaintiff suggest that CBC inadvertently liened the partnership property. While plaintiffs submit an affidavit from counsel stating that two loan officers from the bank believe Browne purposely used the PAP property to obtain his loan, it is beyond dispute that CBC promptly removed the lien. The evidence presented regarding this transaction simply is insufficient to support a mail fraud violation.

Aside from the problems with fraudulent intent, plaintiffs have yet to show that the letters were actually sent through the U.S. mails. More importantly, nothing in the

correspondence suggests the mailings were made in furtherance of a scheme to defraud, as required by Section 1341. United States v. Bohonus, supra at 1171.

C) $125,000 Finder's Fee

Defendants received $125,000 from Signal as a reimbursement for a finder's fee. They admit the money was paid through an intermediary so that the limited partners would not know of the transaction. Once Bryn Mar learned about the payment, CBC complied with their demand for repayment to PAP.

This payment is documented by copies of checks which reflect the transfer of funds to CBC through a third party. While the finder's fee is evidence of possible impropriety by CBC, the court is reluctant to premise a "pattern of racketeering" on such conduct. The

plaintiffs have not shown the checks were sent through the mails. Furthermore, the payment is arguably a mere violation of the PAP agreement. A breach of fiduciary duty or receipt of secret profits, standing alone, is not sufficient to establish mail fraud. United States v. Bohonus, supra at 1172.

D) Management Fees and $265 PBP Registration Fee

Plaintiffs contend CBC charged PAP excessively high fees for pre-development expenses. Once again, there is no direct evidence that CBC used the U.S. mails to exact these fees from the partnership. More importantly, even assuming these charges were improper, plaintiffs' action is more appropriately styled as a breach of the PAP agreement, not mail

fraud underlying a RICO claim. The same reasoning applies to the allegations regarding the registration of PBP.

In sum, concerning the existence of indictable mail fraud, plaintiffs have failed to meet their burden as a party opposing a detailed motion for summary judgment, to "come forward with facts, and not allegations, to controvert the moving party's case." Turner v. Local Union No. 302, Intern. Brotherhood of Teamsters, 604 F.2d 1219, 1228 (9th Cir. 1979).

7. Plaintiffs Have Failed to Establish a "RICO Injury"

Defendants contend Bryn Mar failed to establish a "RICO injury." They argue the plaintiffs' damages arise, if at all, from the separate predicate offenses, not from CBC's pattern of

racketeering. For several reasons, this court agrees.

In denying defendants' prior motion to dismiss, this court held that to state a RICO claim, the plaintiff must allege an injury which occurred by reason of the defendants' violation of Section 1962. Memorandum Decision, supra at 5. Following the decision in Harper v. New Japan Securities Intern., Inc., 545 F. Supp. 1002 (C.D. Cal. 1982), the court applied the "by reason of a Section 1962 violation" test to the plaintiffs' complaint, reasoning that Congress could not have intended to provide treble damages for injuries stemming from the predicate violations alone. Implicit in that holding was the requirement that Bryn Mar eventually establish that its injuries were caused by the defendants' pattern

of fraudulent activity. Upon careful review of the exhibits and affidavits submitted by both sides, the court now finds the plaintiffs have failed to raise a genuine issue of fact regarding their RICO claim.

As discussed supra, Bryn Mar has not established reasonable probability of violations of the federal mail fraud statute. As such, there are no predicate offenses to support the RICO counts.

Beyond that, however, this court agrees that whatever injury the plaintiffs have suffered stems primarily from the separate transactions, not from a pattern of fraudulent activity. There is simply insufficient evidence of an ongoing scheme to injure the plaintiffs. While plaintiffs' allegations present a

plausible RICO framework, Bryn Mar has failed to substantiate its theory of recovery.

The instant case present essentially a business dispute. The plaintiff limited partners disagree with their general partner's implementation of the PAP agreement. The injury claimed by Bryn Mar--loss of control over their real property--stems primarily from CBC's purported breach of the partnership agreement. The defendants were in a position to harm the plaintiffs, if indeed they have, because the parties entered into a business relationship for the purpose of developing the Palomar property. CBC and Richard Browne took cerain actions relative to the agreement which plaintiffs find objectionable. Their proper remedy is breach of contract,

breach of fiduciary duty, or perhaps common law fraud. But, there is simply no substantial evidence of an ongoing scheme of racketeering activity carried on by the defendants to gain an advantage over the plaintiffs. Without some substantiated connection between the plaintiffs' alleged harm and a pattern of racketeering, there can be no RICO action. Harper, supra at 1008.

Given the broad and somewhat amorphous language of the statute, several courts have limited RICO's potential reach through a variety of concepts. Some courts have required a "nexus to organized crime." Barr v. WUI/TAS, Inc., 66 F.R.D. 109 (S.D.N.Y. 1975), Waterman Steamship Corp. v. Avondle Shipyards, Inc., 527 F. Supp. 256 (E.D. La. 1981). Other courts require a showing of "competitive

injury" akin to antitrust actions. North Barrington v. Fanslow, No. 80-C-2644 (N.D. Ill. October 9, 1980).

Those decisions have been criticized for reading limitations into the statute which are contrary to RICO's legislative history. Comment, Civil RICO in the Public Interest: "Everybody's Darling", 19 American Crim. L. Rev. 655 (1982).

This court is satisfied the Harper test is consistent with the purposes of RICO. It limits relief under the statute to those individuals who are injured by reason of racketeering. The limitation is derived directly from the statutory language. 18 U.S.C. Section 1964(c).

8. PAP's Effect on Interstate Commerce

Under 18 U.S.C. Section 1962,

plaintiffs must show that the infiltrated enterprise is engaged in interstate commerce. The enterprise alleged in the second and third counts is PAP. While the interstate commerce requirement has been liberally construed in criminal RICO actions, it is an essential element in a RICO claim. Bennett, supra at 1064. Despite the attenuated connections offered by plaintiff, this court finds that PAP is essentially a local entity established for the purpose of developing in-state property. PAP has no real connection to interstate commerce. This is an additional reason to grant summary judgment on plaintiffs' counts two and three.

III. STATE CLAIMS

Given that summary judgment is granted as to plaintiffs' federal

claims, this court should dismiss the pendent state claims. United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966). Although the decision to retain or dismiss the state claims is within the discretion of this court, Wren v. Sletten Construction Co., 654 F.2d 529, 536 (9th Cir. 1981), this dispute should be resolved in state court. The claims involve alleged state law violations and there is an action pending in the Orange County Superior Court. Based on the representation of counsel during the motion hearing that all discovery conducted in the instant case would apply in the state action, duplication

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of such activity will not be necessary.

DATED: September 27, 1983

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WILLIAM B. ENRIGHT, Judge
United States District Court

APPENDIX C

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 82-Ø696-E

O R D E R

BRYN MAR, LTD., a Limited Partnership, by its General Partner, ANGEL MANAGEMENT CORPORATION, a California corporation; ROBERT BIENER, ESTELLE BIENER, BARTON J. BLINDER, ROBERTA BLINDER, JAIME BOROVINSKY, CHARNE DORA BOROVINSKY, ARMANDO HERNANDEZ and MIRTA HERNANDEZ,

Plaintiffs,

vs.

CARLTON BROWNE AND COMPANY, INC., a California corporation and RICHARD C. BROWNE,

Defendants.

AND RELATED CROSS-ACTION.

Pursuant to this court's Memorandum Decision dated September 27, 1983, the

court hereby grants the defendants' motion for summary judgment.

DATED: September 27, 1983

WILLIAM B. ENRIGHT, Judge
United States District Court

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 83-6358

O R D E R

BRYN MAR, LTD., et al.,	)
	)
Plaintiffs-Appellants,	)
	)
vs.	)
	)
CARLTON BROWNE & CO., et al.,	)
	)
Defendants-Appellees.	)
	)

Before: PREGERSON AND NORRIS, Circuit Judges, and SOLOMON,* District Judge.

The panel has voted to deny the petition for rehearing. Judges Pregerson and Norris voted to reject the suggestion for rehearing en banc,

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* The Honorable Gus J. Solomon, Jr. United States District Judge, District of Oregon, sitting by designation.

and Judge Solomon recommends such rejection.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX E

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18 U.S.C. SECTIONS

SECTION 1341. FRAUDS AND SWINDLES

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

SECTION 1961. DEFINITIONS

As used in this chapter -

(1) "Racketeering activity" means

(A) any act or threat involving murder,

kidnaping, gambling, arson, robbery, bribery extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code:.... section 1341 (relating to mail fraud),...;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;....

SECTION 1962. PROHIBITED ACTIVITIES

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity ... to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in or the activities of which affect, interstate or foreign commerce....

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in,

or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person emloyed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt....

SECTION 1964. CIVIL REMEDIES

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons....

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the

suit, including a reasonable attorney's fee.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA,
COUNTY OF SAN DIEGO

I am employed in the county of San Diego, State of California. I am over the age of 18 and not a party to the within action; my business address is: 5315 Avenida Encinas, Suite M, Carlsbad, CA 92008.

On February 25, 1985, I served the foregoing document described as Petition for Writ of Certiorari on the below named persons in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Carlsbad, California addressed as follows:

McCutchen, Black, Verleger & Shea
600 Wilshire Boulevard
Los Angeles, CA 90017

Clerk of the Court
United States Court of Appeals
Ninth Circuit
U.S. Court of Appeals, etc., Bldg.
7th & Mission Streets
P.O. Box 547
San Francisco, CA 94101

(By Mail) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Carlsbad, California.

Executed on February 25, 1985 at Carlsbad, California.

(Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Kathleen M. Menard

KATHLEEN M. MENARD

Office-Supreme Court, U.S.
FILED
MAR 11 1985
ALEXANDER L. STEVAS,
CLERK

(2)

No. 84-1383

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

BRYN MAR, LTD., a Limited Partnership, by its General Partner, ANGEL MANAGEMENT CORPORATION, a California Corporation; ROBERT BIENER, ESTELLE BIENER, BARTON J. BLINDER, ROBERTA BLINDER, JAIME BOROVINSKY, CHARNE DORA BOROVINSKY, ARMANDO HERNANDEZ and MIRTA HERNANDEZ,

Petitioners,

vs.

CARLTON BROWNE AND COMPANY, INC., a California Corporation, and RICHARD C. BROWNE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

HOWARD J. PRIVETT
(Counsel of Record)
SUSAN J. TRIPLETT
PENNY M. COSTA
McCUTCHEN, BLACK, VERLEGER & SHEA
600 Wilshire Boulevard
Los Angeles, California 90017
213/624-2400

Attorneys for Respondents

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600.

5PP

No. 84-1383

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

BRYN MAR, LTD., a Limited Partnership, by its General Partner, ANGEL MANAGEMENT CORPORATION, a California Corporation; ROBERT BIENER, ESTELLE BIENER, BARTON J. BLINDER, ROBERTA BLINDER, JAIME BOROVINSKY, CHARNE DORA BOROVINSKY, ARMANDO HERNANDEZ and MIRTA HERNANDEZ,

Petitioners,

vs.

CARLTON BROWNE AND COMPANY, INC., a California Corporation, and RICHARD C. BROWNE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Carlton Browne and Company, Inc.* and Richard C. Browne respectfully request that the Court deny the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered September 24, 1984.

*Carlton Browne and Company, Inc. has no parent company, no subsidiaries, and no affiliates.

REASONS WHY THE WRIT SHOULD BE DENIED

This case presents no issues concerning fundamental policies of national jurisprudence, nor does it involve a new or novel issue of law. While arising out of a summary judgment on a RICO claim, it does not even remotely implicate the interpretation or application of those federal statutes. Instead, it is merely another of the countless cases challenged each year on the adequacy of the evidentiary record to support the trial court decision. There are no circumstances warranting Supreme Court review and the petition for writ of certiorari should be denied.

Petitioners contend that in affirming the district court's summary judgment the Ninth Circuit raised and decided "*sua sponte*" the issue of the competency of petitioners' evidence. That is not correct. Petitioners themselves placed the competency of their evidence in issue by contending on appeal that the district court erred in finding no genuine issue of material fact and granting summary judgment. Moreover, the appeal challenged the district court's express finding that petitioners had failed to "meet their burden as a party opposing a detailed motion for summary judgment to 'come forward with facts, and not allegations, to controvert the moving party's case.' " (Citations omitted.) ("Memorandum Decision" of United States District Court, p. 11, lines 3-8, Exhibit B of Petitioners' Brief). In short, the district court found that petitioners' "evidence" was deficient both as to its adequacy and its competency.

In reviewing the lower court's decision, therefore, a major question before the Ninth Circuit was whether petitioners' evidence in the district court was sufficient to raise a genuine issue of material fact. That question was properly resolved against petitioners. The Ninth Circuit

affirmed "the summary judgment solely on the basis of Bryn Mar's failure to raise a triable issue of fact with respect to the existence of indictable mail fraud." ("Memorandum" of United States Court of Appeals for the Ninth Circuit, p. 3, lines 17-19, Exhibit A of Petitioners' Brief).

Petitioners also complain that instead of affirming the summary judgment granted by the lower court, the Ninth Circuit should have remanded the case for further evidentiary proceedings to enable them to supplement the record. This position is patently untenable in view of the analysis of the district court and the status of the case. Respondents brought their motion for summary judgment only a few weeks before the scheduled trial of the case. Yet petitioners, even at that late date, were unable to offer evidence disclosing a genuine issue of material fact to be tried. As stated in *Glesenkamp v. Nationwide Mutual Insurance Company*, 71 F.R.D. 1, 4, aff'd, 540 F.2d 458 (9th Cir. 1976):

> "The time must arrive in every case when the plaintiff must demonstrate that there is a genuine issue for trial or have summary judgment entered against him."

Both the district court and the Ninth Circuit in the instant case found that the time had come for petitioners to present their evidence or to have summary judgment rendered against them.

Petitioners seek to invoke the jurisdiction of this Court not to resolve a novel or important question of law nor to remedy some aberrant procedure, but merely to obtain an unjustified third review of the decision on respondents' motion for summary judgment. This case was decided on usual and ordinary grounds and is no different from any other case where the losing party argues that the decision is not supported by the evidence.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,
HOWARD J. PRIVETT
SUSAN J. TRIPLETT
PENNY M. COSTA
McCUTCHEN, BLACK, VERLEGER & SHEA
Attorneys for Respondents